

LAW REVIEW 832

(June 2008)

CATEGORY: 1.5: Timely Application for Reemployment

1.15: Entitlements of Disabled Veterans

Wounded Servicemember Reporting Back to Civilian Job

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Q: I am a colonel in the Army Reserve and also a civilian employee of the Department of the Army. I was called to active duty and deployed to Iraq, in my military capacity. I was injured when an improvised explosive device went off near the vehicle in which I was traveling. My wounds and the necessary surgery and recuperation delayed my release from active duty by about six months, beyond the date when I had informed my civilian employer to expect my return, but I kept my civilian supervisor informed by e-mail and telephone.

I was released from active duty, but not fully recovered, on May 1, 2007. My civilian job does not require vigorous physical activity, but it does require that I use a computer and word processor by means of a keyboard. Because of wounds to my shoulder, I cannot yet do that. I expect that I will largely recover from these wounds, but I need more time. I am not ready to return to work.

Shortly after I left active duty, I communicated with my Department of the Army civilian supervisor. I informed her that I was off active duty but not yet healed and not ready to return to work. She was very brusque with me, telling me that I had no option and must return to work immediately or that I would be fired as AWOL from my civilian job. In early August, slightly more than 90 days after I left active duty, the Department of the Army sent me a letter saying that I was being fired for having failed to report back to work. Help!

A: As I explained in Law Review 77, and other articles, you must meet five eligibility criteria to have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). You must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services, and you must have given your civilian employer prior oral or written notice. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years (as I explain in Law Review 201, *all* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit.) You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge, and without having been dismissed or dropped from the rolls of your uniformed service, and you must have made a timely application for reemployment.

It is clear that you already meet the first four criteria, and the deadline for applying for reemployment has not yet passed. Firing you or threatening to fire you is a clear violation of USERRA.

As I explained in Law Review 7, the deadline to apply for reemployment, under USERRA, depends upon the duration of the period of service from which you are returning. After a period of more than 180 days of service, as in your case, the deadline to apply for reemployment normally expires 90 days after the date of release from the period of service. See 38 U.S.C. 4312(e)(1)(D).

“A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person’s employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.” 38 U.S.C. 4312(e)(2)(A). See also 20 C.F.R. 1002.116.

After a period of service of more than 180 days, the deadline to apply for reemployment normally is 90 days after the date of release from the period of service. In your case, the deadline can be up to two years after the date of release from service, because you are still convalescing from a service-connected injury. As I see it, you have not yet applied for reemployment, and the deadline for doing so has not yet passed.

Q: The personnel officer at my civilian workplace has informed me that I am required to provide documentation that I am convalescing. Is that correct?

A: “A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person’s employer (upon the request of such employer) documentation to establish that—

- (A) the person’s application is timely;
- (B) the person has not exceeded the service limitations set forth in subsection (a)(2) [the five-year limit] (except as permitted under subsection (c)); and
- (C) the person’s entitlement to the benefits under this chapter has not been terminated pursuant to section 4304. 38 U.S.C. 4312(f)(1) (emphasis supplied).

I think that it is abundantly clear, from the text and legislative history of section 4312(f)(1), that the employer’s request for documentation must follow the returning employee’s application for reemployment. In your case, you have not yet applied for reemployment, and the deadline for doing so has not yet passed (because you are still convalescing). Accordingly, you are not required to provide any documentation at this time. When you do apply for reemployment, you should be prepared to provide documentation showing that you were convalescing during the 90-day period after your release from active duty and that the convalescing continued until you applied for reemployment.

Q: Are there other USERRA provisions that are relevant to my situation?

A: Yes. Section 4313(a)(3) applies to a veteran returning with a service-connected disability. The employer is required to make reasonable efforts to accommodate the disability in the position of employment that the veteran would have attained if he or she had been continuously employed (usually but not always the position he or she left). If the disability cannot be reasonably accommodated in that particular position, the employer is required to reemploy the returning disabled veteran in some other position for which he or she is qualified, or can become qualified with reasonable employer efforts, and that provides like seniority, status, and pay, or the closest approximation thereof consistent with the circumstances of his or her case.

I wrote about section 4313(a)(3), in detail, in Law Reviews 121, 136, and 199, and LTC Matthew Gilligan wrote about it in even greater detail in Law Review 0640. As LTC Gilligan explained, this USERRA provision, unlike the Americans with Disabilities Act, applies to *temporary as well as permanent* disabilities.

If you need some additional time off, without pay in order to recuperate from your injury before you return to work, granting you such time off is most certainly a “reasonable accommodation” that the employer would be required to make.

The other relevant USERRA provision is as follows: “It is the sense of Congress that the federal government should be a model employer in carrying out the provisions of this chapter.” 38 U.S.C. 4301(b). If the federal government is expected to be a model, the Department of Defense (DoD) should, I respectfully submit, strive to be a model among models, because DoD is the principal beneficiary of USERRA.